No. 94-956

(4)

FILED
JAN 26 1995
OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
*Petitioners,*

v.

ALABAMA POWER COMPANY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## RESPONDENT ALABAMA POWER COMPANY'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the courts below properly invoked state action immunity where the actions of the Alabama Legislature left no meaningful discretion over competitive restraints in the hands of electric suppliers.

2. Whether the courts below erred by declining to scrutinize the Alabama Legislature's pre-enactment consideration of the Acts and the agreements incorporated in the Acts.

3. Whether this case suggests a need for the Court to re-examine and reformulate the state action doctrine.

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## RESPONDENT ALABAMA POWER COMPANY'S BRIEF IN OPPOSITION

---

Respondent Alabama Power Company ("APC")[1] respectfully requests that the Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's decision in this case. That opinion is reported as *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994) (*Municipal II*).

## STATEMENT OF THE CASE

1. *Factual Background*: In addition to the background facts described in the Petition for Writ of Certiorari filed by the petitioner municipal electric suppliers

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[1] The Southern Company is the parent of APC; Southern Electric Generating Company is the only subsidiary of APC which is not wholly owned by APC.

(collectively, the "Cities") in this action, APC directs the Court's attention to the following additional facts.

The Alabama Legislature (the "Legislature"), in adopting the 1984 Service Territories for Electric Suppliers Act and the 1985 Service Territories for Electric Suppliers Act (collectively, the "Acts"), sought to address the problems associated with uneconomic duplication of electric distribution facilities in Alabama. Commencing in 1979, the Legislature undertook a comprehensive examination of legislation designed to deal with the economic, environmental and other problems caused by electric distribution facility duplication. *See* 1979 Ala. Acts 764. Act No. 79-764 established a Joint Interim Committee on Electricity (the "Joint Committee") to develop legislation "to avoid wasteful, uneconomic duplication of electric facilities, the cost of which must be borne by the consumers." *See Municipal Utilities Board of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1496 (11th Cir. 1991) (*Municipal I*) (quoting 1979 Ala. Acts 764). As noted by the Eleventh Circuit in *Municipal I*, "the Alabama Legislature instructed the [Joint] Committee to develop this legislation in consultation with the three principal distributors of electricity in the state, investor-owned utilities, rural electric cooperatives, and municipal electric systems, *e.g.*, APC, the cooperatives, and the Cities." *Id.* at 1496 n. 2.

The Joint Committee, formed by legislative directive, studied the duplication problem and issued a report concluding that some form of electric service area legislation was desirable and encouraging all interested parties, including APC, the cooperatives and the Cities, to develop proposals for legislation to address the problem. To encourage input from interested parties, the Governor, Lieutenant Governor and the Speaker of the House wrote to electric suppliers in September of 1979, urging the development of consensus legislation. The Legislature considered proposed legislation to deal with the electric line

duplication problem in every session after 1979 until the first of the Acts was passed in 1984. By the time the Legislature reviewed and then passed the 1984 Act, the subject of electric service area legislation was a familiar subject, not one that caught the Legislature unaware.[2]

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[2] The Cities have attempted to impeach the integrity of the Alabama legislative process by referring to the Legislature's findings that the incorporated agreements "[had] been reviewed by the legislature," as an "empty recitation." (Cities' Petition at 10). Furthermore, the Cities attempt to draw the federal courts into a fact specific inquiry concerning the decades-old thought processes of Alabama legislators by extracting a small portion of the deposition of Senator Eugene Foshee from the separate case of *Dixie Elec. Coop. v. Citizens of Ala.*, CV-84-575-PR (Circuit Court of Montgomery County, Alabama). Such testimony is irrelevant to proper state action analysis. To hold otherwise would be to initiate an endless inquiry into the thoughts and understandings of each legislator—a process which is likely to be inconclusive even when the review is limited to a single state senator. For example, among other testimony given by Senator Foshee in the same deposition was the following:

> Q. Okay. Do you recall some period of time, and this appears to be about 14 days after it was introduced, that there was a public hearing before the Senate Commerce Transportation and Utilities Committee?
>
> A. There was a public hearing, I wouldn't swear that that's the right date. Sounds and looks like it.
>
> * * * * *
>
> Q. Do you recall what happened at that committee meeting?
>
> A. There was—several people testified, some pro and some con.
>
> Q. Okay. Testified relative to the bill you had introduced.
>
> A. Right.
>
> Q. Either for it or against it?
>
> A. That's correct.
>
> * * * * *
>
> Q. Okay. Then on March 27, 1984, Exhibit 1 shows that we had the third reading of the bill and the filibuster, you recall that?
>
> A. That's correct.

[Continued]

In 1984, the Legislature passed the 1984 Act and declared that the Act reflected the Legislature's investigation of the "economic, financial and environmental impact associated with the potential for duplication of electric distribution facilities used for the furnishing of retail electric service." *Ala. Code* § 37-14-1 (1992). Benefitting from the work of the Joint Committee and the experience of nearly five years of unsuccessful attempts to pass remedial territorial legislation, the Legislature concluded that the benefits of competition in retail electric markets were outweighed by the burdens of duplicative electric facilities. *Id.* The Legislature adopted the 1984 Act by an overwhelming majority on April 26, 1984.

The 1984 Act sought to eliminate future duplication of facilities at the retail level by assigning service territories to the State's electric suppliers, and in some instances, by allowing suppliers to purchase existing facilities of other suppliers. To accomplish this objective, the 1984 Act employed three types of mechanical rules: (1) rules governing activities inside existing municipal limits; (2) rules governing activities outside existing municipal limits; and (3) rules incorporating specific agreements which were in existence when the Act was adopted. *See Municipal I*, 934 F.2d at 1497. The Eleventh Circuit

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[2] [Continued]

Q. Okay. Was there debate on the floor of the Senate on that day, the day of the filibuster and the third reading?

A. Seems to me like the filibuster lasted two or three days which usually brings up a lot of debate.

Q. Pro and con?

A. Yes, I would say both ways. Some questions asked.

Q. Do you recall what subjects were discussed?

A. Not specifically, but different parts of the bill questions were asked about; I don't remember the exact questions.

Q. Would you remember what parts of the bill were discussed?

A. Practically every part I think.

summarized these three sets of rules in its disposition of the first appeal of this case. *See id.*

The Legislature also established a mechanism for judicial review of the constitutional validity of the 1984 Act prior to consummation of the various purchase and sale transactions contemplated by the Act. *See Ala. Code* § 37-14-10. An action commenced under that mechanism in 1984 ultimately was removed to federal district court in Alabama. Although the federal district court perceived certain constitutional infirmities with the 1984 Act, the court's determination was subsequently vacated for want of jurisdiction. *Dixie Electric Cooperative v. Citizens of the State of Alabama*, 789 F.2d 852 (11th Cir. 1986) (vacating district court order). In the meantime, the Legislature had responded to the initial decision by adopting the 1985 Act, which resembled the 1984 Act but included changes designed to cure the perceived constitutional infirmities. Following commencement of a second validation proceeding, the Alabama Supreme Court upheld the Acts against the primary constitutional challenge under *Ala. Const. of 1901*, art. XII, § 220 (establishing municipal consent as a precondition to certain local utility service). *Alabama Power Co. v. Citizens of the State of Alabama*, 527 So.2d 678 (Ala. 1988). The Alabama Supreme Court then remanded the case to the trial court for consideration of the remaining constitutional challenges. To date, the trial court has not ruled on the additional challenges.

2. *Proceedings Below*: This antitrust action was commenced in 1989 and now has been before the district and circuit courts twice. Initially, the district court granted the defendants' motions to dismiss on *Noerr-Pennington* [3]

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[3] This doctrine precludes application of the Sherman Act to attempts to influence the passage or enforcement of laws, even though the requested official action would produce a restraint on trade or a monopoly. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).

and state action immunity grounds. *Municipal Utilities Board of Albertville v. Alabama Power Co.*, No. 89-H-519-N, unpublished memorandum opinion (M.D. Ala. Jan. 9, 1990) (Cities' Appendix E). In doing so, the district judge expressed his view that the Cities had merely attempted to continue in the judicial arena a battle they lost in the Legislature. *Id.* at 69a.

On the first appeal, the Eleventh Circuit affirmed the dismissal of the Cities' complaint with respect to the general provisions of both Acts. The court expressly found that the two-pronged test of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) had been satisfied. The court ruled that the Acts expressed a clear state policy to displace competition and that conduct of private parties under the Acts was actively supervised. Essentially, the court determined that the general provisions of the Acts were so detailed that they left private parties with no discretion over anticompetitive matters. *See Municipal I*, 934 F.2d at 1503. With respect to the incorporated agreements, however, the Eleventh Circuit remanded the case because those agreements were not part of the appellate record.

On remand, the district court reviewed the incorporated agreements and found that they too met *Midcal's* active supervision requirement. *Municipal Utilities Board of Albertville v. Alabama Power Co.*, No. 89-H-519-N, unpublished memorandum opinion (M.D. Ala. Mar. 4, 1992) (Cities' Appendix B) ("*Remand Opinion*"). In reaching this conclusion, the district court relied upon the active supervision standard recently applied by this Court in *Patrick v. Burget*, 486 U.S. 94 (1988) (state officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy").[4] The district court

[4] Although the district court cited to the opinions of the Third Circuit in *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3d Cir.), *cert. granted sub nom., FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 47 (1991), *rev'd*, 112 S. Ct. 2169 (1992) and the First Circuit

made its immunity finding despite the Cities' contention that three of the incorporated agreements appeared to allow electric suppliers some future discretion to amend or alter the service area allocations. The district court read these provisions together with the Acts' statements that any new incorporated agreements likewise required legislative approval, and determined that the Legislature "did not intend to confer unsupervised private discretion" on electric suppliers when it incorporated the three agreements. *Remand Opinion* (Cities' Appendix B at 19a). The court noted its obligation to save rather than destroy the Acts in selecting among competing interpretations, and recognized the propriety of the Legislature using different means to eliminate duplication in a way that takes account of local conditions. *Id.* at 18a-20a.

On the second appeal, the Eleventh Circuit accepted the district court's interpretation of the Acts and their incorporated agreements and affirmed the active supervision holding. Like the district court, the Eleventh Circuit accepted the Acts' express legislative findings and refused to go behind them. *Municipal II*, 21 F.2d at 387 88 n.4.

## SUMMARY OF ARGUMENT

Because the conduct complained of in this case is that of the Alabama Legislature in adopting the Acts, it is *ipso facto* immune under the state action doctrine. Even if this were not so, the lower courts correctly recognized that the Acts meet the two-part *Midcal* test because they clearly articulate the State's policy to displace competition, and prescribe detailed rules to implement electric service area assignments. The incorporated agreements are an integral part of the State's regulatory program, and while they establish different service area boundaries than

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in *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), the court's application of the active supervision standard tracked the standard from *Patrick*.

the Acts' general rules, they accomplish the same purpose —elimination of costly duplication of electric facilities. The rules contained in the incorporated agreements only can be altered in the future with explicit legislative sanction. The Acts thus afford no opportunity for future unsupervised private discretion.

The Cities fault the decisions below because (i) they relied on an allegedly erroneous interpretation of the Acts, (ii) they accepted the Legislature's explicit findings in the Acts, (iii) they declined to inquire into the level of each legislator's "critical evaluation" of the incorporated agreements, and (iv) they declined to review claimed procedural irregularities associated with passage of the Acts. To describe the sort of state action analysis urged by the Cities is to refute it. To second-guess the legislative process, as the Cities suggest, would be unworkable and fundamentally at odds with the federalism of *Parker*. This Court's refusal in *Ticor* to immunize conduct resulting from regulatory inaction in no way sanctions scrutiny of the Legislature's deliberations or judicial disrespect of explicit legislative findings.

If the state action doctrine were in need of re-examination, this case would provide a poor setting in which to conduct that re-examination. This case involves conduct at the heart of the *Parker* doctrine—the state legislative process itself. No state action pronouncement of this Court has ever sanctioned direct disregard for the text of state legislation, and nothing short of such direct disregard would warrant reversal of the decision below. Review of this case would not only embroil the federal courts in the unnecessary interpretation of state statutes, but also embroil the federal courts in the political give-and-take that produced those statutes. The federalism concerns behind *Parker* must not be so seriously compromised.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. THE COURT BELOW PROPERLY HELD THAT THE CITIES' CLAIMS WERE BARRED BY STATE ACTION IMMUNITY WHERE THE LEGISLATURE LEFT NO MEANINGFUL DISCRETION OVER RESTRAINTS ON COMPETITION IN THE HANDS OF PRIVATE PARTIES.

#### A. The actions complained of by the Cities are actions of the sovereign which are *ipso facto* state action and immune from antitrust scrutiny.

The decisions of the Eleventh Circuit and the district court properly recognized that the Legislature, acting as sovereign, enjoys immunity under the state action doctrine. The seminal case which addressed the relationship of federalism and state sovereignty in the antitrust context was *Parker v. Brown*, 317 U.S. 341 (1943), in which this Court first invoked principles of federalism to conclude that the antitrust laws do not apply to conduct of the sovereign states acting as such. *Id.* at 350-51. Recognizing that Congress never expressed an intention to make state legislatures subject to antitrust limitations, the Court has consistently refused to infer such a purpose. *See id.* Under *Parker*, "when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). As explained in *Hoover*:

> The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. 'There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history.' *Parker*, 317 U.S. at 351. The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only

> requirement is that the action be that of 'the State acting as a sovereign.' *Bates* [*v. State Bar of Arizona*, 433 U.S. 350], 360 [(1977)] . . . .

466 U.S. at 574.

Although the Cities characterize their claims as a challenge to regulated, private anticompetitive conduct, their Petition is riddled with complaints relating to legislative action and procedure in enacting the two territorial Acts.[5] Both the Eleventh Circuit and the district court determined that the actions of the Legislature in incorporating specified agreements satisfied the two-part test of *Midcal*. According to the decision in *Hoover*, however, it was unnecessary for the courts below to reach those conclusions, because, in the Court's words, the more stringent *Midcal* test only is required "when the activity at issue is *not* directly that of the legislature or Supreme Court." *Hoover*, 466 U.S. at 568 (emphasis added); *Id.* at 569 ("Where the conduct at issue is in fact that of the state legislature . . . we need not address the issues of 'clear articulation' and 'active supervision.' "). Although APC, obviously, is a private party, the Cities' brief makes it abundantly clear that "the activity at issue" here is direct legislative action that lies at the heart of the state political process. No previous precedents of this Court

[5] The Cities recite a litany of charges against the actions of the Legislature, as opposed to actions of respondents, attacking the lack of "legislative involvement in the formation of the [earlier] private agreements" (Cities' Petition at 8), claiming it was "impossible for the Legislature to scrutinize the private agreements" (*Id.*), stating the "agreements were never recorded as having been read in a legislative session . . . nor were they assigned . . . and reviewed by any legislative committee . . . nor were the merits . . . ever debated," (*Id.* at 8-9), alleging the "failure of the Legislature to review the private agreements" (*Id.* at 10), asserting the agreements were "merely ratified or rubberstamped by the Alabama Legislature" (*Id.* at 20), and charging the "suggestion of review was merely a recitation in the legislation" (*Id.*). The conduct complained of is clearly the action of the state. This conclusion is fully supported by *Parker*, *Bates*, and *Hoover*.

have sanctioned inquiry into this political process in the legislative arena.

The Cities' invitation to review the process by which the Legislature enacted the Acts, if accepted, would significantly undermine the principles of federalism enunciated in *Parker*. As this Court has noted, "[t]here is nothing in the state-action doctrine, or in antitrust law, that permits us to question the motives for the sovereign action. . . ." *Hoover*, 466 U.S. at 576 n.28. *See also id.* at 579-80; *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985). Electric utility regulation is intensely local,[6] and the Acts represent a local approach to the problem of uneconomic duplication of retail electric distribution facilities. To that end, the Legislature developed a regulatory program that was highly detailed and specific, and that relied on both a system of general rules and the incorporation of specified local agreements. This Court has aptly recognized "that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners." *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377 (1991). The Acts represent nothing less than the Legislature's political judgment on this decidely local issue.

Federal antitrust courts are neither equipped nor permitted to second-guess the wisdom of state legislators. This Court has recognized that "*Parker* was not written in ignorance of the reality that determination of 'the public interest' . . . of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries." *Id.*

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[6] *See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983) (utility regulation is one of the most important of traditional state police power functions).

Nonetheless, the Cities urge the Court to delve into the thoughts, motives and understandings of the Legislature (and, as illustrated by references to Senator Foshee's testimony, individual legislators) in enacting the Acts. If permitted, after-the-fact judicial review of this type would undermine the stability of the legislative process. *See id.* This kind of deconstruction of the legislative process has been consistently avoided. *See Omni*, 499 U.S. at 377; *Hoover* 466 U.S. at 579-580; *see also Llewellyn*, 765 F.2d at 774. The Eleventh Circuit properly rejected the Cities' request to explore how and why the Acts were passed as "patently meritless" and "unworthy of discussion." *Municipal II*, 21 F.3d at 387-88 n.4. *See Hoover*, 466 U.S. at 581 n.34 (a claim that the grading formula was devised to limit competition is basically a challenge against the motive of the sovereign). Once the actions complained of were determined to be acts of the sovereign state Legislature, all further inquiry concerning the deliberative process should have ceased.

**B. Assuming arguendo that the conduct in question is that of private parties, the court of appeals properly found that APC's conduct was immune from antitrust liability under the state action doctrine.**

Assuming that the mere involvement of APC as a defendant in this case invokes the two-part *Midcal* test (and APC submits it does not where the activity in question is conduct of the legislature itself), APC's conduct satisfies that test. Where conduct of private parties is involved, *Midcal* established a two-part test "to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." *Patrick*, 486 U.S. at 99. Under the *Midcal* formulation, the challenged conduct must be pursuant "to a clearly articulated and affirmatively expressed state policy, and it must be 'actively supervised'

by the state itself." *Midcal*, 445 U.S. at 105 (citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) *overruled in part on other grounds, Hallie v. Eau Claire*, 471 U.S. 34 (1985)).

On the first appeal of this case, the court of appeals determined that the Acts met the first prong of *Midcal* because "[t]he Alabama Legislature has clearly articulated a policy to displace competition in the retail electric market except for large industrial customers." *Municipal I*, 934 F.2d at 1502 (citing *Ala. Code* §§ 37-14-1 and 37-14-30) (reducing the costs of line duplication is the policy supporting this regulation). The court of appeals also noted that the incorporated agreements were found by the Legislature to be consistent with the general purpose of the Acts. *Id.* (citing *Ala. Code* §§ 37-14-8 and 37-14-36) (The agreements were "reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in" the Acts.). For these reasons, the court below determined that the Acts, including the general provisions as well as the provisions incorporating the private agreements, satisfied the first part of the *Midcal* test. *Id.* The first prong of the *Midcal* test was not at issue on remand to the district court or on the second appeal to the Eleventh Circuit.[7]

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[7] The court of appeals properly noted that the state policy allowing anticompetitive conduct does not have to be expressly stated. *Id.* at 1502. To that end, this Court has "rejected the contention that [the first prong of the *Midcal* test] can be met only if the delegating statute explicitly permits the displacement of competition." *Omni*, 499 U.S. at 372-73 (citing *Hallie v. Eau Claire*, 471 U.S. 34, 41-42 (1985)). *See also Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994) (legislation need not expressly permit the restraint on competition, rather it is sufficient if such a restraint is a foreseeable result of the legislation). In this case, of course, the language and structure of the Acts reflect an express determination by the Alabama Legislature that the costs of duplication outweigh the "benefit normally associated with competition." *See Ala. Code* §§ 37-14-1; 37-14-30.

### 1. *The Acts are self-executing statutes, which satisfy the active supervision requirement by leaving no discretion over anticompetitive conduct in the hands of private parties.*

The Cities' core argument is that the Acts do not satisfy the active supervision requirement of *Midcal*. This Court has most recently described the purpose of the active supervision requirement as providing for a means "to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2177 (1992) (active supervision analysis focuses on whether the anticompetitive program "is the State's own"). Justice Kennedy also adopted the formulation of the active supervision requirement articulated in *Patrick*.[8]

In *Municipal I*, the court of appeals analyzed the general provisions of the Acts and concluded that the Legislature exercised adequate control over the Acts' service territory allocations to satisfy the active supervision requirement, noting that "the Alabama Legislature has control over all of the decisions being challenged by the cities in this litigation, . . . [and] the general provisions of the Acts have placed no decision-making authority over restraints on competition in the hands of private parties." *Municipal I*, 934 F.2d at 1503; *id.* (the "general provisions of the Acts eliminate virtually all discretionary behavior" by electric suppliers).[9]

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[8] "The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Ticor*, 112 S. Ct. at 2177 (quoting *Patrick*, 486 U.S. at 100-101).

[9] Commentators in the antitrust field have endorsed the decision by the court of appeals with respect to the general provisions of the Acts. Professors Areeda and Hovenkamp, for example, recently observed that as a result of the detailed and mechanical rules

After reviewing the incorporated agreements on remand from the Eleventh Circuit, the district court reached a conclusion similar to that reached by the court of appeals with respect to the general provisions. The district court concluded that "the procedures contained in the incorporated agreements, like the general rules embodied in the Acts, sufficiently control[led] the exercise of future discretionary behavior by electric suppliers to satisfy the active supervision requirement." *Remand Opinion* (Cities' Appendix B at 18a).[10] The district court also rejected the Cities' claim that the Acts allowed unsupervised private discretion by incorporating agreements that, in theory, could be modified by the parties. The court disagreed because the Legislature explicitly required subsequent mutual agreements to be approved by the Legislature. *Id.* at 19a. *See Ala. Code* §§ 37-14-8; 37-14-36.

The lower courts' approach to the active supervision requirement is supported by commentary as well as judicial pronouncements. The Acts represent examples of statutes that are "self-executing." Such statutes satisfy the active supervision requirement because they "leave nothing further to be decided by the relevant parties, as well as nothing for the state to supervise." P. Areeda and D. Turner, *Antitrust Law* ¶ 213d (1978). No regulatory body is left to supervise private conduct under the statute because the statute sets "forth the precise procedures" that must be followed to implement the legislative policy. In

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embodied in the Acts, "no discretion was given to the private parties, there was nothing remaining for the sovereign to supervise, and the requirement [of active supervision] was satisfied." P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 212.7c (Supp. 1994). The Cities' statement that the Acts leave no potential for state agency or public service commission review overlooks the fact that the Acts obviate the need for such review by attending to all the details in the first instance. *See* Cities' Petition at 16.

[10] The district court determined that the incorporated agreements contained "fixed rules" and merely divided service territories in different places than the general provisions of the Acts. *Remand Opinion* (Cities' Appendix B at 18a).

such cases, the state need not employ or rely on a subordinate state agency because the details of the regulatory program are contained in the statute. It would be a curious federalism indeed that required the state to use a subordinate agency whether one was needed or not.

The Cities improperly invoke the "gauzy cloak" references from *Midcal*. (Cities' Petition at 16, 20). According to the Cities, immunity is inappropriate here because the incorporated agreements "were merely ratified or rubber-stamped by the Alabama Legislature," and thus the sovereign merely authorized private parties to violate the Sherman Act. (Cities' Petition at 20). Even if the incorporated agreements originated with private parties, however, the State made them its own by including them in the Acts. The federalism concerns that underlie *Parker* require that states remain free to enlist private initiative in implementing state policies. *See Parker*, 317 U.S. at 352 (producer-proposed marketing plan); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (auto dealer objections triggered state review). This is not a case in which the Legislature blindly authorized future territorial allocations by electric suppliers; rather, the Legislature wove into its regulatory program a number of specific, existing, fixed agreements which it found served the policies of the Acts.[11]

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[11] Professors Areeda and Hovenkamp have pointed to *Municipal I* to illustrate a self-executing statute. An example put forth by these commentators drew a distinction between instances where a legislature approved previously drawn territorial divisions (entitled to *Parker* immunity) and instances where a legislature merely allowed private parties "subsequently to draw up boundaries by mutual agreement . . . ." P. Areeda and H. Havenkamp, *Antitrust Law* § 212.7e (Supp. 1994). In the latter case, "the [active] supervision requirement would be met only if a state regulatory agency with appropriate power to disapprove were required to approve or at least empowered to disapprove the proposed boundaries . . . ." *Id.* Of course, the incorporated agreements involved in this case were approved by the Legislature after they were executed and those agreements which allow for subsequent modifications have been held

The notion of a self-executing statute that satisfies the active supervision requirement is well grounded in state action precedent. In fact, this Court suggested precisely such a possibility in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344-45 n.6 (1987) ("[a] simple 'minimum markup' statute requiring retailers to charge 112 percent of their actual wholesale cost may satisfy the 'active supervision' requirement . . ."). A more recent decision by the New York Supreme Court Appellate Division expressly adopted the theory that a self-executing statute could satisfy the active supervision test. *Jetro Cash & Carry Enterprises v. Dept. of Taxation & Fin.*, 605 N.Y.S.2d 538, 540 (N.Y. App. Div. 1993) (statute regulating resale price of cigarettes defined the price with reference to manufacturers' price; therefore, by creating a detailed mechanism the state met the active supervision requirement). The Acts, including the incorporated agreements, are exhaustively detailed, providing the requisite active supervision to a degree at least equal to that present in *324 Liquor Corp.* and *Jetro.*

### 2. *The lower courts properly credited express statements in the Acts that the Legislature reviewed the incorporated agreements and found them not to be inconsistent with the Acts' purposes and policies.*

In reaching its conclusion that the incorporated agreements met the active supervision requirement, the district court looked to the express determinations by the Legislature, as found in the text of the statute, and concluded that the Legislature had in fact reviewed the agreements. According to the Acts, the incorporated agreements were "reviewed by the legislature, determined to be in the public interest, and found not to be inconsistent with the purposes and policies set forth" in the Act. *Ala. Code*

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to require the approval of the Legislature before such modifications may become effective.

§§ 37-14-8; 37-14-36. The district court declined "to go behind the legislature's statements. . . ." *Remand Opinion.* (Cities' Appendix B at 16a).[12] The circuit court properly affirmed the district court's ruling. *Municipal II*, 21 F.3d at 386.

Despite the clear and unequivocal statement of the Legislature's findings, the Cities argue that the "Legislature tacitly admitted the paucity of its scrutiny or involvement in its finding expressed in the legislation that the private agreements had been 'found not to be inconsistent with the purposes and policies set forth in . . . [the Acts].'" (Cities' Petition at 23) (quoting the Acts). The language of the Acts in no way acknowledges shortcomings in the Legislature's review. More importantly, however, the Cities' position represents a frontal assault on the integrity of the Legislature's explicit pronouncements. Nor is the Cities' claim supported by the facts of this case. Passage of the Acts was preceded by significant legislative study. A comparison of the two Acts also reveals a number of changes in the legislation, some of which arose directly from an earlier (now vacated) determination that the 1984 Act raised state constitutional concerns. With respect to the provisions in the Acts relating directly to the incorporated agreements, the deletion and addition of certain incorporated agreements[13] and other changes[14] evidence political give-and-take in the formulation of the Acts.

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[12] The Cities argue that "no review of the agreements occurred" (Cities' Petition at 20), and that the Acts contemplated only the "potential for legislative scrutiny of the private agreements." (*Id.* at 23). In other words, the Cities charge that the sovereign Legislature of the State of Alabama misstated the facts in the text of the statute. The principles of federalism underlying *Parker* cannot countenance such disrespect of the state as sovereign.

[13] One agreement was deleted and four were added.

[14] In the 1985 Act, the Legislature deleted language from the 1984 Act that limited the period in which incorporated agreements could be submitted for legislative approval.

The Cities attempt to have this Court dive headlong into the nuances of the Alabama legislative process by alleging that there was no record that all of the incorporated agreements were delivered to the Clerk of the House and the Secretary of the Senate and no record that members of each house had been notified about the availability of the agreements. (Cities' Petition at 23). If any such procedural irregularities occurred (and APC submits they did not), they may be addressed in the Montgomery County Action. Even if they did occur, such procedural shortcomings would carry no antitrust significance, and consideration of them would inappropriately immerse this Court in Alabama legislative procedure.[15]

Far from declining to credit express legislative findings, Alabama courts have ruled that "[w]hen [a] statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by that clear pronouncement." *Macon*, 613 So.2d at 320 (quoting *Parker v. Hilliard*, 567 So.2d 1343, 1346 (Ala. 1990)). Because the statement of legislative findings challenged by the Cities is absolutely clear and capable of only one interpretation, the lower courts were correct in affording the incorporated agreements with the same degree of respect given to the balance of the Acts.[16]

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[15] The attempt by the Cities to draw the federal courts into the internal affairs of the Legislature is made all the more inappropriate by the fact that "Alabama does not preserve committee reports, or the debates that surround the adoption of legislation . . . ." *Macon v. Huntsville Utilities*, 613 So.2d 318, 320 (Ala. 1992). Thus, although the Supreme Court of Alabama has conceded its inability to review the legislative history of a particular statute, the Cities would have the federal courts attempt such a feat. *See id.*

[16] The Eleventh Circuit, in *Municipal II*, considered the arguments raised by the Cities and found that the Cities' claim was "patently meritless." *Municipal II*, 21 F.3d at 386 n.4 (citing *Hoover* and *Omni*).

### 3. *The decisions below do not conflict with* Ticor *and do not create a conflict among circuits.*

The Cities assert that the district court erred in relying upon a decision by the First Circuit Court of Appeals in *New England*, 908 F.2d 1064 (1st Cir. 1990), and a decision of the Third Circuit Court of Appeals in *Ticor*, 922 F.2d 1122 (3d Cir. 1991) *cert. granted sub nom., FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 47 (1991), *reversed* 112 S. Ct. 2169 (1992). The Cities fail to point out, however, that the district court actually used the same exposition of the active supervision prong as did this Court in *Ticor*. Both the district court in this case and this Court in *Ticor* referred to the same description of the active supervision test, drawing from the Court's earlier words in *Patrick* ("active supervision . . . mandates that the state exercise ultimate control over the challenged anticompetitive conduct . . . . The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.") *Patrick*, 486 U.S. at 101. Thus, the district court adopted the appropriate standard which required it to "determine whether the terms of the agreements ensure[d] that state officials [had] and exercise[d] the authority to review any action taken under the incorporated agreements by the parties thereto." *Remand Opinion.* (Cities' Appendix B at 16a).

In their effort to read the decision below as one that is contrary to *Ticor*,[17] the Cities take considerable liberty with the *Ticor* opinion. Among other things, the Cities misread *Ticor* to require federal courts to probe the legislative process that produced the state legislation relied upon as a source of state action immunity. (Cities' Petition at 20). A comparison of *Ticor* and the present case reveals that *Ticor* did not involve direct supervision by

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[17] *See* Cities' Petition at 20 ("the decisions below are directly contrary to . . . *Ticor*").

the Legislature, arose in a much different factual setting, and resulted from regulatory inaction (in the context of a "negative option" regulatory regime) rather than affirmative legislative action of the type involved here.[18]

The fundamental difference between *Ticor* and this case, of course, is that in this case the Legislature did act—it made a specific, affirmative decision to include the incorporated agreements in the Acts through the exercise of its sovereign power to enact legislation. Moreover, the Legislature did not blindly approve unspecified future agreements; it approved specific agreements that were detailed and fixed at the time they were incorporated into the Acts. The Legislature was careful to restrict the addition of new agreements later and required that such agreements receive express legislative sanction. This is not a case in which regulatory inaction or potential regulatory intervention is proffered as a "substitute for a decision by the State" because here there *was* "a decision by the State." This Court's conclusion in *Ticor* that "whatever the potential for State regulatory review . . . active supervision did not occur" is simply not applicable to the affirmative action of the Legislature in enacting the Acts and expressly declaring legislative findings concerning the incorporated agreements.

The Cities also minimize the fact that the relevant state decisionmakers in *Ticor* were state insurance officials, not the members of the Legislature in the affected states.[19]

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[18] The negative option system involved in *Ticor* allowed rates to become effective without state action unless rejected by state regulatory bodies. The Acts employ no such mechanism.

[19] In attempting to foster the perception of a conflict between *Ticor* and the decisions below, the Cities cite *Yeager's*, 22 F.3d 1260, and *DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601 (5th Cir. 1993), *cert. denied sub nom., United States Metroline Servs. v. Southwestern Bell Tel. Co.*, 114 S. Ct. 183 (1993). Both of the decisions cited by the Cities involved supervision by a state commission or a regulatory agency, as opposed to active supervision by the state sovereign itself.

Nothing in *Ticor* indicates, and *Ticor* certainly does not hold, that the active supervision analysis requires an assessment of the level of diligence of the legislators who voted for particular state legislation. This Court's state action decisions have never sanctioned such an inquiry. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3 n. 28 (Supp. 1994). The Cities' expansion of *Ticor* simply disregards this important distinction between direct action of the sovereign and action of its subordinate agencies. *See Hoover*, 466 U.S. at 567-68; *Cf. Omni*, 499 U.S. at 378 (distinguishing bribery of a single regulator from bribery of some members of the legislature).[20]

In a practical sense, the approach suggested by the Cities would send the federal courts cascading into the thought processes of legislators from a decade ago.[21] If the Court were to acept the Cities' view, there would be no manageable judicial standard by which such an inquiry could be conducted in the highly political context of the legislative process. For this same reason, the Court has declined to sanction a state action standard that would turn on whether bribery or corruption entered the legislative process. *See Omni*, 499 U.S. at 378-79 (Sherman Act does not regulate political activity).

As early as 1810, the Court questioned the very competence of the federal judiciary to embark on the kind of

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[20] The Cities' position also would create enormous evidentiary problems associated with discerning whether the legislature's consideration was sufficient. *See United States v. Public Utilities Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (statute should be interpreted by analysis of statute rather than by "psychoanalysis of Congress"); *James v. Todd*, 267 Ala. 495, 506, 103 So.2d 19, 28 (1958) (the judiciary will not inquire into the motives or reasons of legislature or the members thereof).

[21] The lack of recorded legislative history in Alabama would make this an unrealistic, if not impossible task. *See Macon.* Without recorded legislative history, there could be no credible support for the Cities unqualified assertion that, "[n]o review of the [incorporated] agreements occurred." (Cities' Petition at 20).

inquiry into motives urged by the Cities. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (cited in *Omni*, 499 U.S. at 378). If federal courts are ill-equipped to examine or evaluate the effect of corruption on the legislative process, surely they are much more ill-equipped to distinguish "superficial" legislative review from a "critical examination" by each legislator, to weigh the "sufficiency" of legislative debate, or to gauge the quality of state legislative review. Even if some legislators' review had been superficial, there would be no means of determining whether those deficiencies tainted the deliberative process as a whole. Obviously, the Cities' position would create an insurmountable problem of determining, in the legislative arena, how much debate is enough or how much knowledge of the facts the legislators must have. These problems would be aggravated in a state such as Alabama where no complete legislative history is maintained.

Justice Kennedy's opinion in *Ticor* was clearly limited to the circumstances of the case then before the Court—a case of "agency inaction" and the "clear absence of state supervision." *Ticor*, 112 S. Ct. at 2180. In fact, in the concluding paragraphs of the opinion, Justice Kennedy specifically cautioned that the Court's decision was to be read in light of the particular circumstances before the Court. *See id.* In doing so, he distinguished the Courts's prior decisions in *Omni, Fisher* [22] and *324 Liquor Corp.* and made it clear that *Ticor* did nothing to undermine the Court's holdings in those cases. *See id.* It is noteworthy that each decision distinguished in *Ticor* entered into the Eleventh Circuit's application of the active supervision test to the Acts' general provisions prior to remanding the case for consideration of the incorporated agreements. *Compare Municipal I*, 934 F.2d at 1504 (citing *324 Liquor Corp.* 479 U.S. at 344 n. 6) *with Ticor*, 112 S. Ct. at 2180 (citing *324 Liquor Corp.* 479 U.S. at 344 n. 6). *Ticor* does not require, and federalism

[22] *Fisher v. City of Berkeley*, 475 U.S. 260 (1986).

principles would not permit, dissecting the legislative process in the manner urged by the Cities.

The Cities' position before this Court urges precisely the sort of analysis of legislators' subjective intent and "deconstruction of the governmental process" that was explicitly condemned in *Omni*. *See Omni*, 499 U.S. at 377. The *Ticor* opinion should not be read so broadly, and nothing in that opinion undermines *Omni*'s admonition that *Parker* "was not meant to shift [the public interest] judgment from elected officials to judges and juries." *Id.* The Cities' reading of *Ticor* is plainly wrong because *Ticor* cited *Omni* with approval in the portion of its opinion explaining that the Court's holding should not be broadly interpreted outside the circumstances of negative option regulatory schemes. *See Ticor*, 112 S. Ct. at 2180.

The Cities' expansive view of *Ticor* disregards many fundamental tenets of the state action doctrine from cases that *Ticor* either cited or left intact. In *Hallie*, 471 U.S. at 44 n.7, for example, this Court cautioned against embroiling the federal courts in the unnecessary interpretation of state statutes. Ignoring this admonition, the Cities challenge the lower courts' interpretation of the incorporated agreements and the Acts, the Legislature's failure to read the agreements in open session, and the level of pre-enactment review of the agreements (Cities' Petition at 8-9, 11 & n.8, 14 & n.10, & 23). Similarly, in *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48, 57 n.21 (1985), this Court cautioned against a state action test which would prompt the kind of interference with state sovereignty that *Parker* was intended to prevent. The Cities urge this Court to embroil the federal courts, not only in detailed interpretation of state statutes but also in extensive analysis of the political debate and process that produced those statutes. This ereroneous view is out of step with the Supreme Court's obvious deference to state legislative process. APC re-

spectfully submits that *Ticor* contemplated no such wholesale abandonment of prior state action precedent.

#### 4. *The lower courts applied the proper standard of statutory interpretation with regard to those agreements that allowed for future modifications.*

The Cities continue to pursue an argument that some of the incorporated agreements allow for "unsupervised private discretion." (Cities' Petition at 21, 24-25). The Cities' argument is without merit. The district court reviewed those incorporated agreements, which, according to the Cities, allowed for unsupervised modifications. The court then read those agreements in *pari materia* with the incorporating provision of the 1985 Act and determined that any subsequent modifications to those agreements "must be approved by the Legislature." This determination directly contradicts the Cities' argument that "any state corrective action or oversight of the agreements was theoretical at best." (Cities' Petition at 21).

As noted by the Eleventh Circuit, the federal courts are required to "look to state rules of statutory construction." *Municipal II*, 21 F.3d at 387. Under Alabama law, "[w]here the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other would be valid, the courts should adopt the construction which would uphold it." *House v. Cullman County*, 593 So.2d 69, 72 (Ala. 1992) (quoting *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 10, 18 So.2d 810, 815 (1944), *cert. dismissed*, 325 U.S. 540 (1945)). *See also Baldwin County v. Jenkins*, 494 So.2d 584, 588 (Ala. 1986) ("Where a statute may be given two reasonable constructions, this court should apply the construction which will uphold, and not defeat, the legislative will.") *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (The cardinal principle of statutory construction is to save and not destroy). The courts below

simply followed the mandate of Alabama law and interpreted the Acts and the incorporated agreements in a way that saved rather than destroyed. This is not "creative interpretation, but merely adherence to long-established principles of statutory construction.[23]

## II. *PARKER* AND ITS PROGENY PROPERLY MAINTAIN THE FUNDAMENTAL BALANCE OF FEDERALISM PRINCIPLES AND ANTITRUST LAW AND, IN ANY EVENT, THIS CASE DOES NOT PRESENT AN APPROPRIATE SETTING TO REVISIT *PARKER*.

Contrary to Cities' assertion, the decisions below do not represent "the carving out of an exception to *Ticor* and *Midcal*".( Cities' Petition at 26). In both *Municipal I* and *Municipal II*, the Eleventh Circuit applied *Midcal* as refined in *Patrick* and concluded that the Acts "[place] no decision-making authority over restraints on competition in the hands of private parties," that the Acts "eliminate virtually all discretionary behavior" by electric suppliers, and that the Acts' incorporation of the specified agreements likewise entailed explicit legislative approval of customer allocations, *Municipal I*, 934 F.2d at 1503; *Municipal II*, 21 F.3d at 387. The court of appeals invoked no special rule merely because "state legislation is involved." (Cities' Petition at 26). Nonetheless, as noted in Part IA, because the Cities principally challenged the Legislature's conduct and the legislative process, satisfaction of the *Midcal* standard was not necessary.

Nor did the lower court expand the scope of *Parker* by refusing to weigh the independence and quality of the

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[23] The Cities' argument that electric suppliers have failed to exchange maps within the time prescribed by the Acts (Cities' Petition at 21) is likewise insufficient to preclude immunity. The maps do not draw the boundaries. The Legislature has already done that. The maps simply confirm the location of the boundaries as a ministerial item of convenience. Moreover, this argument applied, if at all, to the Acts' general provisions, and not to the incorporated agreements. *See Municipal I*, 934 F.2d at 1504.

Legislature's deliberative process, or refusing to disregard the Acts' explicit findings concerning the incorporated agreements. *See Municipal II*, 21 F.3d at 387-88 n.4 (relying on *Midcal, Hoover* and *Omni*). Such an inquiry would be unworkable and completely unsupported in this Court's pronouncements. The Acts unquestionably embody the sort of "deliberate state intervention" needed to demonstrate that the anticompetitive effects of the Acts are "the State's own," not those of private parties. *See Ticor*, 112 S.Ct. at 2177.[24] This Court has consistently declined to dilute the federalism underpinnings of *Parker*,[25] and it should not now change the way federalism concerns and antitrust policy have been balanced for more than fifty years. No novel issue is presented by the decisions below and no additional guidance is needed.

Perhaps recognizing that existing state action precedents firmly support the decision below, the Cities urge the Court "to revisit the state action doctrine." (Cities' Petition at 17, 22-29). The Court should decline this invitation for two reasons. First, the Cities' proffered "revisitation" is not a refinement or fine tuning of *Parker*—it is a wholesale abandonment of the federalism that underlies *Parker*. *Compare* Cities' Petition at 17 (expressing concern that states will have "license to override the antitrust laws") *with Parker*, 317 U.S. at 350-51 (Sherman Act not intended to restrain state from "activities directed by its legislature"). Second, as the Cities' petition makes clear, this case turns not on the scope of the state action doctrine but on its application (i) to the lower courts' interpretation of the Acts, (ii) in light of claimed procedural irregularities surrounding the Acts' passage, and (iii) to the particular deliberations of Alabama legislators.

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[24] To suggest, as the Cities do, that the Acts represent "private action 'masquerading' as action of the states" (Cities' Petition at 19) is to ignore the critical fact that the competitive restraint in this case comes directly and solely from the sovereign act of the Legislature.

[25] *See, e.g., Hoover*, 466 U.S. at 574, 580.

The Cities' Petition is replete with citations of Alabama legislative history and Alabama constitutional provisions, and factual assertions concerning the deliberations that produced the Acts. At best, review of this case would embroil the Court in the intricacies of Alabama law. Review would do little to advance the evolution of the state action doctrine.

## CONCLUSION

For the reasons stated herein, a writ of certiorari should be denied.

Respectfully submitted,

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